

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JONATHAN NELSON and MARGO
NELSON, individually and on behalf of their
marital community,

Plaintiffs,

v.

SPECIALIZED LOAN SERVICING, LLC, a
foreign limited liability company,

Defendant.

Case No. 3:20-cv-05461-BHS

**DEFENDANT’S RESPONSE IN
OPPOSITION TO PLAINTIFFS’
MOTION TO CERTIFY QUESTIONS
TO THE WASHINGTON SUPREME
COURT AND MOTION TO STAY
PENDING CERTIFIED QUESTIONS**

**NOTE ON MOTION CALENDAR:
October 2, 2020**

Defendant Specialized Loan Servicing, LLC (“SLS” or “Defendant”) submits its Response in Opposition to Plaintiffs’ Motion to Certify Questions to the Washington Supreme Court and Motion to Stay Pending Certified Questions (the “Motion”).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs’ Motion is unfounded, untimely, and should be denied. Plaintiffs purported in this action to bring claims against SLS for violation of the Washington Consumer Protection Act, Fair Debt Collection Practices Act, Washington’s Collection Agency Act, and for negligence. Each of

1 these claims lacked any basis in Washington law, and was correctly dismissed by this Court with
2 prejudice on SLS's motion to dismiss.

3 Plaintiffs' previous (and erroneous) position in this lawsuit was that Washington law clearly
4 supported their claims. Now that they have been shown to be in error, Plaintiffs are belatedly changing
5 their tune, and instead requesting that purported issues of Washington law be certified to the
6 Washington Supreme Court. Plaintiffs' Motion is without merit and should be denied.

7 II. LEGAL STANDARD

8 Federal courts in Washington *may* elect to certify questions of local law to the Washington
9 Supreme Court. RCW 2.60.020; *see also Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974)
10 (“Resort to certification is not mandatory where state law is unclear on a particular issue.”). However,
11 not every question of local law should be certified—the “mere difficulty in ascertaining local law is
12 no excuse for remitting the parties to a state tribunal or for the start of another lawsuit.” *Id.* The Ninth
13 Circuit has noted:

14 Federal courts are not precluded from affording relief simply because
15 neither the state Supreme Court nor the state legislature has enunciated a
16 clear rule governing a particular type of controversy. Were we able to
17 invoke only clearly established state law, litigants seeking to protect their
rights in federal courts by availing themselves of our diversity jurisdiction
would face an inhospitable forum for claims not identical to those resolved
in prior cases.

18 *Paul v. Watchtower Bible & Tract Soc’y*, 819 F.2d 875, 879 (9th Cir. 1987). Further, the existence of
19 “doubt as to local law” does not make certification “obligatory.” *Lehman Bros.*, 416 U.S. at 391.
20 Certification rather “rests in the sound discretion of the federal court.” *Fidelitah, Inc. v. Insitu, Inc.*,
21 No. 13-CV-3128-TOR, 2016 WL 4265749, at *4 (E.D. Wash. Aug. 11, 2016) *citing Lehman Bros.*,
22 416 U.S. at 391.

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1 **III. ARGUMENT**

2 **A. Plaintiffs’ Motion to Certify Questions to the Washington Supreme Court is**
3 **Untimely and Improper.**

4 Plaintiffs’ attempt to certify questions to the Washington Supreme Court after this Court has
5 already dismissed Plaintiffs’ complaint with prejudice is improper. The “Washington Supreme Court
6 does not operate as a court of appeals for decisions of [district courts].” *Kerrigan v. Qualstar Credit*
7 *Union*, No. C16-1528-JCC, 2016 WL 7103750, at *3 (W.D. Wash. Dec. 6, 2016), *aff’d*, 728 F. App’x
8 787 (9th Cir. 2018) *citing Hann v. Metro. Cas. Ins. Co.*, 2012 WL 3098711, at *3 (W.D. Wash. July
9 30, 2012). “There is a presumption against certifying a question to a state supreme court after the federal
10 district court has issued a decision.” *Id. citing Thompson v. Paul*, 547 F.3d 1055, 1064 (9th Cir. 2008).

11 Here, Plaintiffs’ filed their Motion only after this Court had already issued its ruling dismissing
12 their claims. But the Motion fails to present any reason to disregard the presumption that a motion to
13 certify is inappropriate at this stage, or even to address the issue. Instead, Plaintiffs’ Motion merely
14 rehashes the same arguments regarding the effect of Washington’s six-year statute of limitation, which
15 this Court has already heard and decided. Nor does the Motion point to any authority to suggest that
16 this Court’s ruling is incorrect, or that it relied on a point of law that requires the input of the
17 Washington Supreme Court. Even if it is true that there is no Washington case directly on point, the
18 mere absence of a specific authority does not mean state law is unsettled or unclear. *See Wendel v.*
19 *Travelers Cas. & Sur. Co. of Am.*, No. CV-10-0028-LRS, 2011 WL 13228236, at *2 (E.D. Wash. Mar.
20 21, 2011) (finding that the record suggests not that local law is undetermined, but rather that
21 Washington courts have had little occasion to parse an opinion based on the admitted facts of the case
22 at issue).

23 For all the reasons already briefed to this Court previously, existing Washington law does in
24 fact support SLS’s position. Even if a request to certify had been made at the appropriate time, this
25 Court would have been well within its authority to deny such a request, and to grant SLS’s motion to

1 dismiss. More to the point, there is no basis whatsoever at this point to grant an untimely and baseless
2 request for certification, where this Court was already able to render an opinion based on current
3 Washington law.

4 **B. The Facts of this Case Do Not Raise the Questions Proposed to be Certified.**

5 Next, even if Plaintiffs' Motion were otherwise proper, this case would not be the appropriate
6 vehicle for certification of the issues of local law that Plaintiffs put forward. The Motion attempts to
7 certify two questions: (1) whether a lender can collect time-barred installment payments through
8 nonjudicial foreclosure; and (2) whether threatening to collect time-barred installments in a nonjudicial
9 foreclosure action amounts to an unfair and deceptive act in violation of Washington's Consumer
10 Protection Act.

11 Neither question would be appropriate for certification on the record of this case. First, this case
12 was not a nonjudicial foreclosure action. While the legal effects of a nonjudicial foreclosure were
13 conceptually relevant in this case, it would be a stretch at best to certify a foreclosure question in a case
14 that did not even involve a foreclosure.

15 Second, Plaintiffs' theory in this case was that by "threatening" that all amounts due and
16 owing on their loan would be recouped to the lender in a nonjudicial foreclosure, SLS committed an
17 unfair or deceptive act in violation of the Consumer Protection Act. *See generally Magney v. Lincoln*
18 *Mut. Sav. Bank*, 34 Wn. App. 45, 57 (1983) (describing unfair and deceptive acts for purposes of the
19 Consumer Protection Act). But Plaintiffs' present request to certify this only causes their position to
20 collapse under the weight of their own logic. If it really were the case that Washington law did not yet
21 exist on the relevant points, or that the law were unclear, it could not be an unfair or deceptive act for
22 a lender to seek to recover in foreclosure all amounts due and owing on a loan. And any "threat" of
23 such a nonjudicial foreclosure would be legally distinct from the kind of misstatement,
24 misrepresentation, or deceptive act that may otherwise give rise to a claim under the CPA. Thus, this

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1 question is inappropriate for certification to the Washington Supreme Court based on the facts of this
2 case and existing Washington law.

3 **C. This Action Should Not be Stayed.**

4 This Court already issued an opinion rejecting Plaintiffs' positions and dismissing the complaint
5 with prejudice. Plaintiffs now point to their pending Motion for Reconsideration, but that motion fails
6 to (1) present newly discovered evidence, (2) demonstrate that the court committed a clear error or that
7 the decision was manifestly unjust, or (3) demonstrate a intervening change in controlling law." *Sch.*
8 *Dist. No. 1J v. ACandS, Inc.* 5 F.3d 1255, 1262 (9th Cir. 1993). More to the point, a motion for
9 reconsideration "shall not stay discovery or any other procedure." LCR 7(h)(2). For all the reasons
10 above, both the request for certification and the request for a stay should be denied.

11 **IV. CONCLUSION**

12 For all of the foregoing reasons, Defendant respectfully requests that this Court deny
13 Plaintiffs' Motion to Certify Questions to the Supreme Court and Motion to Stay Pending Certified
14 Questions.

15 DATED: September 16, 2020.

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